

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

PERCIVAL HAYES,

Petitioner,

-v.-

9:04-CV-1196
(GLS)(DRH)

DALE ARTUS, Superintendent, Clinton Correctional
Facility,

Respondent.

APPEARANCES:

PERCIVAL HAYES

Petitioner, *pro se*

99-A-2922

Clinton Correctional Facility

Box 2001

Dannemora, NY 12929-2001

GARY L. SHARPE, U.S. DISTRICT JUDGE

ORDER

Percival Hayes ("Hayes" or "petitioner") filed a petition for a writ of habeas corpus with the Court which was dismissed by Decision and Order of this Court filed January 7, 2005. Docket No. 10. Hayes has appealed that dismissal to the Second Circuit. Hayes previously requested a Certificate of Appealability ("COA"), and that request was denied by this Court.¹ See Docket Nos. 13-14. Hayes has now submitted a second, and virtually

¹By way of background, Petitioner filed a habeas petition that was assigned case number 9:04-CV-0687. In 9:04-CV-0687 Petitioner was directed to file an amended petition by order dated June 28, 2004. Petitioner failed to comply with that order and the action was dismissed on September 20, 2004. Petitioner never filed an appeal from the September 20, 2004 judgment in 9:04-CV-0687, nor sought reconsideration of the order and judgment. Instead, on October 18, 2004, Petitioner filed a second petition in the instant action. The second petition, dated October 14, 2004, was not identified with the prior case number, nor identified as an amended petition. Rather, in the second petition, Hayes states that "[t]his order [referring to case 9:04-CV-0687] was decided pursuant to Rule 4 without respondents responding to petitioner's application. Which now brings about this second attempt to file an application for a writ of habeas corpus." Docket No. 1, note 1.

identical, request for a Certificate of Appealability. Docket No. 16.

28 U.S.C. § 2253(c)(1) provides in relevant part that:

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
(B) the final order in a proceeding under section 2255.²

A COA may only be issued “if the applicant has made a substantial showing of the denial of a constitutional right.” See 28 U.S.C. § 2253(c)(2).

After reviewing the relevant portions of the file in this action, the Court finds that Hayes has failed to make such a showing herein. Therefore, the Court denies his request.

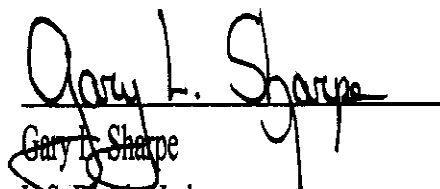
WHEREFORE, it is hereby

ORDERED, that petitioner's application for a Certificate of Appealability (Docket No. 16) is denied, and it is further

ORDERED, that the Clerk of the Court serve a copy of this Order upon the petitioner by regular mail.

IT IS SO ORDERED.

Dated: April 7, 2005
Albany, New York



Gary L. Sharpe
U.S. District Judge

² Rule 22 of the Federal Rules of Appellate Procedure also provides that an appeal may not proceed “unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c).” See Fed.R.App.P. 22(b).